No. 83-2098

In the Supreme Court of the United States

OCTOBER TERM, 1984

BENJAMIN H. SASWAY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether petitioner was impermissibly selected for prosecution for violation of the Military Selective Service Act in retaliation for the exercise of his First Amendment rights.

2. Whether the district court properly excluded testimony concerning petitioner's motives for refusing to register with Selective Service.

3. Whether failure to register with Selective Service is a continuing offense.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A3) is reported at 730 F.2d 771 (Table). The opinion of the district court (Pet. App. A5-A6) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 2, 1984. A petition for rehearing was denied on April 25, 1984 (Pet. App. A22). The petition for a writ of certiorari was filed on June 19, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of California, petitioner was convicted of violating 50 U.S.C. App. 453 and 462(a) by failing

to register with Selective Service as required by Presidential Proclamation No. 4771. He was sentenced to 30 months' imprisonment. The court of appeals affirmed.

1. On July 2, 1980, President Carter, acting pursuant to the Military Selective Service Act (50 U.S.C. App. 453), issued Presidential Proclamation No. 4771, 45 Fed. Reg. 45247 (1980). The Proclamation directed all males residing in the United States who were born during 1960 to register with the Selective Service System during the week of July 21, 1980, by filling out a registration card at a local post office. Petitioner, a college student born on December 9, 1960 (Tr. 373), was required to register but did not do so either during the week of July 21 or at any time thereafter. Instead, on July 24, 1980, he sent a letter to President Carter declaring that he was writing "as a symbolic statement of [his] opposition to all military conscription" and that he was not registering for the draft because of his belief that draft registration was "immoral and incompatible with [a] free society" (Tr. 387-388; GX 5).[1] Petitioner's letter was referred to Selective Service, which had received a number of other communications from people who stated that either they or persons known to them had not registered as required by law. In response to these reported violations, Selective Service established a "passive enforcement" system under which initial enforcement efforts would be directed at possible nonregistrants whose names had come to its attention (Tr. 16-19).[2]

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[1]In addition, on June 28 and July 1, 1980, petitioner appeared on a local television program and stated that he would not register for the draft (Tr. 561-562).

[2]The development and operation of the "passive enforcement" system is detailed (at 3-7, 12-13) in our brief in *Wayte* v. *United States*, cert. granted, No. 83-1292 (May 29, 1984), a copy of which is being sent to counsel for petitioner.

On June 17, 1981, Selective Service sent a letter by certified mail to each reported violator who it verified had not registered and for whom it had a mailing address. The letter explained the duty to register, stated that Selective Service had information that the person was required to register but had not done so, requested that he either comply with the law by filling out an enclosed registration card or explain why he was not subject to registration, and warned that a violation could result in criminal prosecution and specified penalties. Petitioner responded with a letter confirming that he had not registered and reiterating that he would not do so. Tr. 394-402, 541, 550; GX 8-10.

On July 20, 1981, Selective Service transmitted to the Department of Justice, for further investigation and possible prosecution, the names and files of 134 possible nonregistrants, including petitioner (Tr. 38-40). After screening out individuals who appeared not to be required to register, David J. Kline, the attorney in the Criminal Division of the Department responsible for supervising enforcement of the Selective Service laws, referred the remaining names to the Federal Bureau of Investigation for additional inquiry and to the United States Attorneys for the districts where the nonregistrants resided. Petitioner was among the people so referred. Tr. 107-108.

In order to encourage registration, the Department adopted a policy of leniency under which it would seek to obtain voluntary (albeit late) compliance by the nonregistrant as an alternative to prosecution. Pursuant to this so-called "beg" policy, the appropriate United States Attorney was required to notify identified nonregistrants by registered mail that, unless they registered within a specified time, prosecution would be considered. In addition, an FBI agent generally was sent to interview the person before prosecution was commenced. On October 7, 1981, pursuant to the "beg" policy, an Assistant United States Attorney

sent petitioner a letter urging him to register or face possible prosecution. Petitioner, however, failed to respond. Tr. 254-255, 425-427; GX 11.

On October 19, 1981, petitioner's attorney, Charles T. Bumer, informed the Assistant United States Attorney responsible for petitioner's case that petitioner was then out of the country. On that basis, Bumer requested that prosecution be deferred until he had the opportunity to talk with petitioner. During a second conversation in early December 1981, Bumer told the Assistant that he would notify him within a few days whether petitioner would register. Tr. 256, 427. Later that month, the Criminal Division instructed all United States Attorneys to suspend efforts to seek indictments against nonregistrants and to allow a grace period to provide them a final opportunity to register (Tr. 112-114, 402-403). On December 14, 1981, Bumer again contacted the Assistant United States Attorney and informed him that petitioner would not register in view of the suspension of prosecutions but that, if there was a change in the prosecution policy, petitioner would like another opportunity to register before he was prosecuted (Tr. 258).

The grace period continued until February 28, 1982. Thereafter, the Department instructed United States Attorneys to proceed with prosecutions if nonregistrants persisted in refusing to comply with the law (Tr. 122-126). Accordingly, on June 16, the Assistant United States Attorney telephoned Bumer to ascertain whether petitioner would register and to inform him that the government was proceeding with the prosecution. Bumer later returned the call and advised the Assistant that petitioner still would not register. Tr. 431-433. On June 30, 1982, an indictment was returned charging that petitioner, "[b]eginning on or about July 27, 1980 and continuing up to the date of the return of

the indictment, * * * did knowingly and wilfully fail, evade and refuse to present himself for and submit to registration" (Pet. App. A4).

2. a. Prior to trial, petitioner moved to dismiss the indictment on the ground of selective prosecution. In particular, he alleged that although more than 500,000 eligible young men had failed to register for the draft, only "vocal" opponents of the registration program were targeted for prosecution under the "passive enforcement" system. During an evidentiary hearing on the motion, the government presented the testimony of, inter alia, Criminal Division attorney Kline and Edward A. Frankle, who was responsible for the development and implementation of Selective Service's registration compliance program. Frankle testified that Selective Service had been attempting to establish an "active enforcement" program by using Social Security data to identify nonregistrants;[3] however, at the time of petitioner's referral to the Justice Department, the "passive enforcement" program was the only system for which Selective Service had the legal authority and resources to identify those who had failed to comply with the registration law. Frankle also explained that he had no knowledge of any anti-draft activities in which petitioner might have engaged and that he had referred petitioner's name to the Department because petitioner had confessed to violating the law. Tr. 41-44. Kline testified that the objective of the Criminal Division's prosecution policy was not to penalize "vocal" dissenters but to encourage compliance with the registration law. To that end, the Criminal Division determined that it would initially seek to obtain voluntary registration by each person whose name had been referred to it by Selective Service. If the nonregistrant complied, the investigation would be terminated. If, however, the nonregistrant

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[3]The development of an "active enforcement" program is described in our brief in *Wayte* (at 7-10, 13).

persisted in his refusal to register, he would be prosecuted. Kline emphasized that the purpose of the prosecution policy was to avoid possible problems and not to engage in any kind of selective prosecution. Tr. 101-104, 174, 185, 221, 247.

Following the hearing, the district court denied petitioner's motion to dismiss the indictment (Pet. App. A5-A6). It found no evidence either "that [petitioner] was * * * individually singled out for prosecution as a result of his exercise of his First Amendment right to free speech" or "that the Selective Service laws have been deployed against vocal protesters in retaliation for the exercise of their First Amendment rights" (*id.* at A5-A6). It also found that, under the "passive enforcement" system, "the Government is not singling out vocal protesters for prosecution but is prosecuting and would prosecute any nonregistrants that come to its attention either by self-reporting or by third party reports" (*id.* at A6).

b. Prior to trial and again at the beginning of the defense case, the district court excluded testimony proffered by petitioner concerning his motives and reasons for refusing to register with Selective Service (Tr. 373B, 580, 586). Testifying on his own behalf at trial, petitioner admitted that he had failed to register during the week of July 21, 1980, or at any time thereafter; that he had refused repeated requests by government officials to register; that he had written letters to the President and other government officials acknowledging his nonregistration; and that he had "intentionally and deliberately failed to register under the Selective Service program" and had made this "personal and moral [decision] * * * fully aware of the fact that legal consequences [would] flow from [the] failure to register" (Tr. 625, 636-638, 644, 649-650). Petitioner also testified that, although he was "not absolutely certain" concerning his obligation to register during the week of July 21 because

of a lower-court decision declaring the registration statute invalid on grounds of gender discrimination, he admitted that "[t]o the best of [his] knowledge * * * [he] felt that [he] did have to register that week" and knew that the court's ruling had been stayed by the Supreme Court prior to the inception of the registration period (Tr. 624-625, 632-633, 639). When Bumer attempted to elicit testimony from petitioner as to why he had failed to register, had chosen not to remain quiet about his nonregistration, and had rejected various means of evading his obligation under the registration law, the district court ruled that the questions were irrelevant (Tr. 626-627, 630-631).

c. Petitioner also requested a jury instruction that he could not be convicted unless the jury found that he knowingly and willfully failed to register during the week of July 21, 1980, which was the period that the Presidential Proclamation prescribed for persons in his age group to register. The district court refused the instruction on the ground that, as the result of the 1971 enactment of 50 U.S.C. App. 462(d), refusal to register was a continuing offense (Tr. 303). The court instructed the jury that "Section 462(d) of the Military Selective Service Act imposes on eligible individuals a continuing duty to register until they reach age 26" (Pet. App. 17a).

3. By unpublished memorandum, the court of appeals affirmed petitioner's conviction (Pet. App. A1-A3). Relying on its earlier decision in *United States* v. *Wayte*, 710 F.2d 1385 (9th Cir. 1983), cert. granted, No. 83-1292 (May 29, 1984), the court rejected petitioner's claim of selective prosecution. It also held that "[t]he district court's refusal to permit [petitioner] to testify as to his motives and reasons for failing to register was within the court's discretion since such testimony was not relevant to the question of guilt or innocence" (Pet. App. A1). Finally, the court concluded that it need not address the question whether failure to

register was a continuing offense because the allegation in the indictment that petitioner had knowingly and willfully failed to register on or about July 27 "encompass[ed] at least the latter portion of the week of July 21-26" during which he was required to register under the Presidential Proclamation (*id.* at A1-A2).

ARGUMENT

1. Petitioner contends (Pet. 7) that he was impermissibly selected for prosecution under the "passive enforcement" system. That issue is currently before the Court in *Wayte* v. *United States, supra.* As discussed in our submissions in *United States* v. *Schmucker,* No. 83-2035, and *Eklund* v. *United States,* No. 83-1959,[4] we agree with petitioner (Pet. 7) that the instant petition should be held pending *Wayte* and then disposed of (with respect to the first question presented) as appropriate in light of that decision.

2. Petitioner also claims (Pet. 7-9) that the district court erred in excluding evidence regarding his motives in refusing to register with Selective Service. This claim, however, confuses the concepts of intent and motive. The registration statute (50 U.S.C. App. 462(a)) requires the government to prove that the defendant, with knowledge of his obligation and the intent not to comply, "knowingly" did not register as required by law. See U.S. Br. in *Wayte* v. *United States,* at 34. Once that has been established, it is simply irrelevant, as the district court correctly recognized (Pet. App. A16), what the defendant's reasons might have been for his knowing nonregistration. See *United States* v. *Irwin,* 546 F.2d 1048, 1051-1053 (3d Cir. 1976); *United States* v. *Day,* 442 F.2d 1034, 1034-1035 (9th Cir. 1971); *United States* v. *More,* 436 F.2d 938, 940 (9th Cir.), cert. denied, 402 U.S.

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[4]Copies of our petition in *Schmucker* and our brief in response to the petition in *Eklund* are being sent to counsel for petitioner.

1012 (1971); *United States* v. *Boardman,* 419 F.2d 110, 114 (1st Cir.), cert. denied, 397 U.S. 991 (1970); *Harris* v. *United States,* 412 F.2d 384, 388-389 (9th Cir. 1969); *United States* v. *Smogor,* 411 F.2d 501, 504 (7th Cir.), cert. denied, 396 U.S. 972 (1969); see also *United States* v. *Pomponio,* 429 U.S. 10 (1976). Here, by his own admission, petitioner was aware of his obligation to register with Selective Service and deliberately refused to comply. Accordingly, the district court correctly excluded evidence of petitioner's motivation.[5]

3. Finally, petitioner argues (Pet. 9-12) that failure to register with Selective Service is not a continuing offense. Petitioner acknowledges (Pet. 3 n.1, 12) that this is the same issue that is presented in *Eklund* v. *United States, supra.* For the reasons stated in our brief in response to the petition in *Eklund,* petitioner's argument is without merit and does not warrant further review.

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[5] *United States* v. *Bowen,* 421 F.2d 193 (4th Cir. 1970), upon which petitioner relies, is not to the contrary. In that case, the defendant was indicted for willfully failing to report for induction. At trial, however, he was not allowed to testify why his action was not willful (421 F.2d at 194, 197). Here, by contrast, petitioner had a full opportunity to present testimony on the relevant mental element of the offense with which he was charged and was prevented from discussing only the immaterial issue of his motives for knowingly refusing to register.

CONCLUSION

With respect to the first question presented, the petition for a writ of certiorari should be held pending the decision in *Wayte* v. *United States* and then disposed of in light of that decision. In all other respects, the petition should be denied.

Respectfully submitted.

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